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THE ROLE OF LAW IN EQUAL EMPLOYMENT OPPORTUNITY

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The question of the proper role of law in the equal employment opportunity field has been strongly debated for a number of years.[1] Some persons contend that this is an area in which the application of law is inappropriate, either because such a law is unconstitutional, unworkable, or undesirable.[2] Others feel that the enactment of law in this area is a panacea for the problems of certain groups which suffer unreasonable discrimination in our society and that the passage and enforcement of equal employment legislation is the key to a prompt solution to the problems of these groups.[3] A third position, and the one adopted in this article, is that while the role of law is limited, the law may be used as an effective tool in eliminating some unreasonable discrimination in the area of hiring and other employment practices. The role of law in this field, even if effectively drafted and enforced, is but one of a number of legal and extra-legal avenues to the gradual improvement of the economic status of groups which suffer unreasonable discrimination.[4]

I. THE LIMITATIONS TO THE ROLE OF LAW

An understanding of the limitations of the role of law in the equal employment opportunity area is as essential to the formulation of a workable statutory scheme as the conviction that regulation is needed. The limited role which law may play in guaranteeing equal employment opportunity comes home to me each morning as I proceed down a crowded freeway toward the city of Houston. Quite frequently, I listen to a radio program sponsored by "X Company." The broadcast is a newsy testimony to the advances of modern science. After several minutes of information concerning new scientific discoveries,

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1 See Cong. Q. Serv., Revolution In Civil Rights, 3-5, 21-25, 35, 36, 38 (1965).

2 See 110 Cong. Rec. 13077 (1964) (remarks of Senator Ervin).

3 See Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 405 and similar bills, 88th Cong., 1st Sess. 176, 181 (1963) (statement of Julius Hobson, then Chairman, Washington CORE).

4 During the 1964 presidential campaign much was said about the need of changing the "hearts of men." This is an extra-legal avenue to change but it is by no means an exclusive one. It is as futile to rely totally on such an extra-legal means to change as to expect a miraculous cure to discrimination by the passage of legislation.

an announcement is made to engineers inviting them to apply for positions at "X Company's" plant near the Manned Spacecraft Center. The announcer states that job applicants must have experience in digital system design, computer programming, instrumentation, or telemetry. He ends his spiel with this statement: "X Company is an equal opportunity employer."

There is no apparent reason to doubt the truth of "X Company's" claim to the status of "equal opportunity employer," but there is a reason to doubt the significance of the fact to the vast majority of American Negroes. All too few Negroes are trained and educated to take advantage of scientific and engineering positions with "X Company."[5] This points up one of the basic limitations in equal employment opportunity legislation and enforcement. Such legislation can attempt to eliminate unreasonable discrimination but it cannot magically, by the touch of a wand, transform a person from a poorly trained and educated individual to a college graduate who has achieved a high degree of development of his individual talents and abilities.[6]

This is not to suggest that the educational factor alone is the key to the solution of the employment problems of the American Negro and other groups which have suffered from unreasonable discrimination.[7] However, it appears axiomatic that the first obstacle to be overcome by Negroes in their search for equal employment opportunities is the achievement of the education and training necessary to perform the increasingly demanding tasks of a technologically sophisticated society. Only when an individual is as fully trained and competent as his competitor can he begin to register complaints concerning unreasonable discrimination. The fact is that few employers will discriminate on unreasonable grounds, even if they might be inclined to do so, so long as there is a basis for denying a job or other benefits of employment on the ground that the applicant lacks skill and competence.[8]

The argument is sometimes made that employers should ignore

[5] See Hearings Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare on S. 773, S. 1210, S. 1211, and S. 1937, 88th Cong., 1st Sess. 431-32 (1963) (remarks of Leslie Dunbar, Executive Director, Southern Regional Council).

[6] James Farmer, National Director, CORE, has recommended a crash program of remedial education for Negro workers. See id. at 221 (upgrading of schools, business sponsored training programs, union apprenticeship programs and government sponsored retraining programs will have to be utilized to overcome the educational gap of the Negro).

[7] For a brief statement outlining the pervasive nature of discrimination against the Negro, see Mendelson, Discrimination 1-4 (1962).

[8] See Kopp, Management's Concern With Recent Civil Rights Legislation, 16 Lab. L.J. 67, 71 (1965), for an indication of management's interest in ability tests, and Snow, Equal Employment Opportunity, 2 Ga. State B.J. 27, 30 (1965), for suggestion of "bona fide" reasons for refusal of employment.

skill and competence, or at least minimize these factors as criteria, in hiring Negroes.[9] The justification given for this approach is that the Negro has been thwarted by the white man in his search for equal opportunity and that, in order to compensate for years of oppression, the Negro deserves favored treatment to overcome the gap created by unreasonable discrimination. Such an approach overcomes the gap of skill and competence by minimizing or ignoring these factors in personnel decisions. It is doubtful that this answer to the problem will, in the long run, best serve the interests of the Negro, because it fails to account for the effect of these decisions on the Negroes employed under such criteria or for the importance American employers attach to efficient production and the power they have to see that efficiency is not undermined. The Civil Rights Act of 1964 explicitly rejected a course of preferential treatment.[10]

Title VII does not guarantee the Negro a job under a quota system, and neither does it assure him of the existence of job opportunities. It is patently obvious that unemployment may result from a number of factors other than discrimination. Economic stagnation or full scale recession may be more damaging to the employment of Negroes, for example, than the total effect of discrimination in hiring policies. There is ample evidence to support the assertion that Negroes, as a group, are the "last hired and the first fired," and the existence of widespread unemployment would add greatly to the problem.[11] The effect of automation on the job market also bears heavily on the Negro, since he is usually less able to function in newly created jobs requiring a high degree of training and generally performs the less highly skilled tasks which are being eliminated from the job market. None of these problems will be solved by the enforcement of equal employment opportunity legislation.

More will be said later in this article about enforcement of Title VII of the Civil Rights Act, but it should be noted here that one of the limitations of the role of law in this field is the inherent difficulty of enforcement. The field of personnel decisions is one which is replete with subjective decisions and judgments.[12] Promotion may depend not only on our employer's knowledge of our production and efficiency, but on his judgment concerning our ability to get along with others, and on

[9] But see exchange between Roy Wilkins, Executive Director, NAACP, and Senator Joseph Clark, Hearings Before the Subcommittee on Employment and Manpower of the Senate Committee On Labor and Public Welfare, supra note 5, at 204, and remarks of James Farmer, id. at 225, in which both Negro leaders express opposition to such an approach.

[10] §§ 703(h), (j).

[11] See Manpower Report of the President and A Report On Manpower Requirements, Resources, Utilization and Training 43-44 (1963).

[12] See Berg, Equal Employment Opportunity Under the Civil Rights Act of 1964, 31 Brooklyn L. Rev. 62, 63 (1964).

our attitudes toward others with whom we might be working in a particular capacity. These factors are only illustrative of various subjective judgments in personnel decisions.[13] The most carefully drawn statute and the most vigorous enforcement will not be able to eliminate some unreasonable discrimination from entering judgments of this type.

Even when ascertainable discrimination exists, the law will be limited in providing solutions due to the very slowness of its operation. Indeed, even if Title VII had been drafted to enable the quickest possible action, the requirements of due process and fairness due those answering unlawful practice charges would require time-consuming investigation and consideration by the Commission. This slow action is in the nature of the quasi-judicial and judicial processes. It is not likely to be eliminated.

In spite of the limitations discussed above, the role of law is important and necessary in the elimination of unreasonable discrimination. The law can undoubtedly be utilized to eliminate the more overt types of discrimination, and a properly drafted and enforced piece of legislation should be a catalyst in the process of reducing the more covert discriminatory practices.

II. The Role of Law and Criteria for an Effective Legal Framework

If law is to be used to eliminate certain types of unreasonable discrimination in employment relations, what is the proper subject of such legislation? What is "unreasonable" discrimination? Why is it "unreasonable"? What is the law seeking to accomplish?

Our nation has declared, in Title VII of the 1964 Civil Rights Act, that certain employment practices are unlawful. Basically, discrimination on the basis of an individual's "race, color, religion, sex or national origin" is prohibited.[14] In effect, Congress has declared that this type of discrimination is unreasonable.[15] Decisions and practices based upon other discriminatory factors are not prohibited. Why these categories of discrimination are prohibited can only be ascertained by an analysis of the history and the values of the American people.[16] For our purposes, it is sufficient to say that the nation, through Congress,

[13] For suggestions of other criteria which may still be utilized by employers in personnel decisions, see Kammholz, Civil Rights Problems in Personnel and Labor Relations, 53 Ill. B.J. 464, 470, 476 (1965).

[14] §§ 703(a)-(d), 704(a), (b).

[15] For a concise statement of Title VII's basic purpose, see 110 Cong. Rec. 13078 (1964) (remarks of Senator Cooper).

[16] For a short history of fair employment legislation, see Mendelson, supra note 7, at 70-75.

has forcefully expressed itself.[17] There is little doubt as to how the nation defines unreasonable discrimination.

Title VII of the Civil Rights Act was designed to guarantee equal opportunity in the job market to all citizens regardless of race, color, religion, sex or national origin. The act attempts to eliminate those factors from consideration in personnel decisions and to allow other factors such as training, ability, performance, efficiency and capacity to be determinative. The achievement of this goal depends in large part on whether the law was effectively drafted. How is one to judge the merits of a statutory scheme designed to help eliminate unreasonable discrimination in employment? The criteria listed below are some of the more important requisites of effective legislation in this field:[18]

(1) The law should be constitutionally valid.
(2) The law should prohibit all categories of unreasonable discrimination which might occur in the employment field.
(3) The law should cover all persons and institutions which might be engaged in unreasonable discrimination.
(4) The law should give relief to all persons who might be the victims of unreasonable discrimination.
(5) The law should provide a complaint oriented procedure which may result in a full investigation of and remedy for all discriminatory practices followed by the employer involved.
(6) The law should provide for a clear and simple complaint procedure consistent with methods used in reporting other types of discrimination.
(7) The law should provide clear jurisdictional definitions which establish one forum for a given classification of discriminatory conduct.
(8) The law should enable one to obtain the speediest remedy possible within the limits imposed by the necessity of adequate ascertainment of the facts.
(9) The law should require the keeping of sufficient records to permit an evaluation of alleged discriminatory conduct in the making of personnel decisions.

The evaluation of the provisions of Title VII which follows is conducted in terms of the above criteria. These standards are proposed as the minimum objectives which must be achieved if a statutory scheme is to be effective.

[17] See 110 Cong. Rec. 13082-83 (1964) (speech by Senator Humphrey in favor of Title VII).

[18] For other suggested criteria, see statement of Hon. John F. Henning, Under Secretary of Labor, Hearings Before the Subcommittee on Employment and Manpower of the Senate Committee on Labor and Public Welfare, supra note 5, at 100, and statement of Jacob Sheinkman, id. at 465-66.

III. Does Title VII Meet the Test?

A. *Constitutional Validity and Coverage*

There is little question that the framers of Title VII did an excellent job in providing a solid constitutional foundation for the legislation.[19] The power of Congress to regulate commerce has been utilized in an appropriate manner, and there can be no doubt about the constitutional validity of the statute after the Supreme Court's decisions in the *McClung*[20] and *Heart of Atlanta*[21] cases. The framers deftly avoided basing the legislation on the fourteenth amendment, and doubtlessly avoided considerable difficulty by doing so.

The wisdom of the Congress in providing adequate coverage in the statute matches its foresightedness in avoiding constitutional entanglements. Every important classification of unreasonable discrimination is prohibited.[22] The prohibitions reach almost every important employment relationship from hiring to firing. The few exceptions limiting the statutory coverage are negligible in effect.[23]

Title VII therefore meets the tests of the first four criteria suggested in part II above, and further elaboration on the coverage of the act is left to a fellow contributor to this symposium.

B. *Complaint Procedure*

Much has been said about the merits of the complaint oriented procedure provided by Title VII. Negro leaders have been extremely critical of limiting the action of the Commission to the investigation of complaints registered by aggrieved individuals.[24] Persons who have studied the operation of the state fair employment agencies have also attacked this approach.[25] The difficulty with these criticisms has been the failure of critics to suggest how one would establish priorities in investigating the various employers, unions, and employment agencies which might be guilty of discrimination if a complaint oriented procedure was not used. On the other hand, there is merit to the charge that a complaint procedure which results only in the investigation of an individual complainant's grievance is inadequate.

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[19] See 110 Cong. Rec. 6988-91 (1964) (statement on constitutionality).

[20] Katzenbach v. McClung, 379 U.S. 294 (1964).

[21] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[22] §§ 703(a)-(d), 704(a), (b).

[23] §§ 703(e)-(j). The most important exceptions are those contained in §§ 703(e), (h).

[24] See comments of James Farmer, Hearings Before the Subcommittee On Employment and Manpower of the Senate Committee On Labor and Public Welfare, supra note 5, at 221; statement of Roy Wilkins, id. at 199; statement of Herbert Hill, Labor Secretary of NAACP, Hearings Before the General Subcommittee On Labor of the House Committee on Education and Labor, supra note 3, at 142-43 (1963).

[25] See Hill, Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations, 14 Buffalo L. Rev. 22, 24 (1964).

A complaint oriented procedure which results in a full investigation of a particular employer's personnel practices may be the most acceptable means of producing the maximum effect in the application of law in the equal employment area. This is particularly true if the employer is thereby subjected to an adequate remedy should discrimination exist. Such an approach provides an adequate solution to discrimination on an employer by employer or union by union basis. It avoids the allegation of "fishing expedition" on the part of employers and unions by conducting investigations only in connection with complaints filed by individuals who have allegedly suffered discriminatory treatment. Yet it provides an investigation and remedy which reaches beyond the individual grievance.

Does Title VII provide the kind of investigatory and remedial procedures necessary to make a complaint oriented approach effective? There is reason to doubt that it does. The argument can be made that the investigation permitted by section 706 must be limited to a consideration of the individual case and that the relevant evidence will be very narrow in scope.[26] It would then follow that the Commission has no authority to conduct an investigation broad enough to reveal a pattern and practice of discrimination.[27]

There is an alternative theory which would allow cooperation between the Commission and the Attorney General and authorize investigations which are wider in scope. One can contend that the pattern of treatment of a class of individuals by a particular employer, labor organization or employment agency is relevant in determining whether unlawful discrimination has taken place. A pattern of past discriminatory treatment would be some evidence of unlawful discrimination in a particular case. On this basis, the Commission could conduct a thorough investigation of discriminatory practices by a given employer before arriving at a decision on a particular complaint. Evidence of a pattern or practice of discrimination could then be delivered to the Department of Justice for the consideration of the Attorney General. If the Attorney General concluded that there was reasonable cause to believe that a pattern or practice of discrimination existed, then a civil action could be initiated under section 707.

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[26] Section 710 provides that the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence *relevant or material to the charge under investigation*. Section 706 states that the Commission may conduct an investigation whenever it is charged in writing under oath by a person claiming to be aggrieved that a covered institution has engaged in an unlawful employment practice. In § 703 unlawful employment practices are defined in terms of discrimination against "any individual." Therefore, the charge is related to discrimination against an individual.

[27] Since the Commission itself has only the conciliatory powers granted in § 706(a), the restriction of its investigatory powers would rob it of any major significance.

A possible difficulty with the latter approach is the prohibition contained in section 706 which reads as follows:

> Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding.

"Such endeavors" presumably refers to all of the investigatory proceedings conducted by the Commission. If the testimony taken under oath and the documentary evidence accumulated in Commission investigations may not be turned over to the Attorney General for his consideration because this would make "public" such information, then the sponsors of Title VII have been frustrated in a way which they did not anticipate. Senator Humphrey certainly foresaw close cooperation between the Justice Department and the Commission,[28] and the preferable interpretation of this prohibition would exclude the sharing of information between governmental agencies from its coverage. Surely the Commission was not given the power to "refer matters" to the Attorney General for the institution of a suit under section 707 without being given the authority to reveal the evidence supporting such referrals.[29]

The discussion above postulates an effective method of operation under the complaint oriented procedure of Title VII. The courts will have to grant the Commission powers to conduct investigations which may yield evidence of pattern of discrimination, and the Commission will have to maintain close cooperation with the Justice Department in order for these results to be achieved.[30] In addition, there is one more prerequisite which must be fulfilled: The whole scheme will fail if complaints are not submitted by individuals who have suffered discriminatory treatment.[31]

If one attempts to put himself in the position of a person who has been discriminated against by an employer, labor organization or employment agency, he may gain some insight into the chaos of the civil rights enforcement. Generally, the complaining party is not one who is well versed in the law, much less a person who has made a detailed study of Title VII.[32] He is a person with a feeling that he has been dis-

[28] See 110 Cong. Rec. 13693 (1964).

[29] See § 705(g)(6).

[30] Such cooperation between federal agencies is stymied all too often by institutional jealousies.

[31] On October 4, 1965, Commission Chairman Franklin D. Roosevelt, Jr. announced a $165,000 grant to Wayne State University in Detroit to conduct a nationwide research project in the area of patterns of discrimination in employment. The press release stated: "The study aims to shed light on criticisms that a strict complaint action procedure does not fulfill the spirit of the equal employment opportunity laws."

[32] It is unlikely that he will have even seen one of the notices required by § 711.

criminated against in some aspect of employment relations. If he is a Negro, it is possible that he has been the victim of discrimination in other areas, including voting rights, schools, public facilities or public accommodations. He will be frustrated if he chooses to register his unlawful employment practice complaint in the same form he has used in reporting other types of discrimination. If he were erudite in the law, the complainant would know that no less than three different methods of registering complaints are appropriate under the Civil Rights Act of 1964: Under Title II, an oral complaint is enough to initiate an investigation;[33] under Titles III[34] and IV,[35] written complaints are required; to comply with Titles V[36] and VII,[37] one must file a complaint in writing under oath. To add to the confusion, jurisdiction to deal with the complaint may be in the Equal Employment Opportunity Commission,[38] the Department of Justice,[39] the President's Committee on Equal Employment Opportunity,[40] the Community Relations Service,[41] or the National Labor Relations Board,[42] not to mention the overlapping jurisdiction of state agencies. This confused state of affairs prevails in all areas of civil rights investigation and enforcement and has been the subject of critical comment.[43] It is as equally distressing to the complainant as to his employer.[44]

No less confusing than the lack of uniformity in the required form of complaints and the myriad of agencies to which one might direct his grievance[45] are the time limitations within which one may seek relief.

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[33] Since a specific form is not spelled out, an oral complaint is acceptable.

[34] § 301(a).

[35] § 407(a).

[36] § 504(a) or § 104(a) of Civil Rights Act of 1957, 71 Stat. 635, 42 U.S.C. § 1975c (1964).

[37] § 706(a).

[38] Ibid.

[39] § 707.

[40] Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961); Exec. Order No. 11114, 28 Fed. Reg. 6485 (1963).

[41] § 1002.

[42] Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (1963); Independent Metal Workers (Hughes Tool Co.), 147 N.L.R.B. 1573 (1964).

[43] Cong. Q. Serv., supra note 1, at 76.

[44] See Kopp, supra note 8, at 76-77.

[45] The complainant's confusion could be alleviated somewhat by placing responsibility for the receipt and referral of civil rights complaints with the Civil Rights Commission. A simple written complaint, *not* under oath, sould be required in all instances. The Civil Rights Commission could evaluate the complaints received and refer them to the proper agency for action. This would enable that Commission to keep records which permit evaluation of the performance of various agencies in dealing with civil rights complaints. It would also allow uniform policy on jurisdiction. The effectiveness of such a system would depend upon widespread publicity being given to it and the creation of a staff which could process complaints and refer them quickly and efficiently. The Civil Rights Commission could perform this role under the authority of § 104(a)(4) of Civil Rights Act of 1957, 71 Stat. 635, as amended, 42 U.S.C. § 1975c (1964).

Instead of setting one basic time limitation for the registration of complaints with the Commission, the statute suggests three.[46] Then, even if the layman overcomes the obstacle of filing his complaint in proper form with the proper agency in the proper time, he must meet the further requirement of filing his lawsuit within the proper time should compliance not be achieved through state action or voluntary compliance.[47]

In essence, the complaint procedure in the Civil Rights Act is a stumbling-block to enforcement, not a simple procedural tool which may be utilized in the efficient processing of grievances. The requirements of the statute are confusing and burdensome to the individual who has suffered some form of discrimination. Even if the complaint is properly registered, it is possible that the courts may restrict the scope of Commission investigations and prevent close cooperation between the Commission and the Department of Justice. If that occurs, the best complaint procedure will be meaningless.

C. *Jurisdictional Definitions*

Reference has already been made to the jurisdictional confusion which prevails in the equal employment area. One of the basic results of Title VII is to allow state fair employment agencies to continue their work in the field.[48] Under Title X, the Community Relations Service may conceivably play a role in employment disputes.[49] Title V specifically provides that the Civil Rights Commission shall serve as a national clearing house for information in respect to denials of equal protection in the field of employment.[50] Executive Order 10925 provides for a Committee on Equal Employment Opportunity in the area of government contracts,[51] and the NLRB has exercised its powers in matters involving discrimination by unions.[52]

Title VII of the Civil Rights Act compounded the confusion of overlapping jurisdiction rather than eliminating it. Exclusive jurisdiction over employment problems was not placed in the Commission but was shared with state commissions and other federal agencies. The

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[46] § 706(d).

[47] § 706(e).

[48] §§ 706(b)-(d), 709(b).

[49] To allow the Community Relations Service such a role would be ridiculous since its function in such a case would be conciliatory, thus duplicating the function of the Commission.

[50] § 104(a)(4) of the Civil Rights Act of 1957, 71 Stat. 635, as amended, 42 U.S.C. § 1975c (1964).

[51] This Committee's functions have been transferred to the Department of Labor, which has other responsibilities in the area of government contracts. Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965).

[52] For a discussion of NLRB decisions in this area, see Rosen, The Law and Racial Discrimination in Employment, 53 Calif. L. Rev. 729, 781-98 (1965).

Civil Rights Act thus failed to establish one forum for each classification of discriminatory conduct in the field of employment or to place exclusive jurisdiction over all employment discrimination in the hands of the Commission.

D. *Speed of the Remedial Process*

Note has already been taken of the slowness of the judicial process in dealing with problems in the employment area.[53] The statutory scheme of Title VII does something to contribute to a speedier consideration of employment problems by providing certain time limitations for the handling of complaints by state agencies and the Commission.[54] On the other hand, the mere fact that the law requires referral of problems to state agencies is a factor which can slow the handling of complaints by sixty days.[55] Of course, the real slowness of remedial action occurs when either the individual complainant[56] or the Department of Justice[57] is forced to bring suit in order to obtain compliance. Since the Commission does not have the power to issue cease and desist orders upon reaching its conclusions, the process of factual determination must be duplicated by the court in reaching a decision.[58] This time consuming process leaves much to be desired.

The importance of quick action to the individual complainant should be apparent. A person who has suffered from discrimination in hiring policies cannot wait forever to obtain a job. He must earn his living in the here and now, and even an award of pay from the date of discriminatory action will not answer the problem of meeting present expenses. Every unnecessary obstacle to remedial action is a further discouragement to those who might be inclined to complain of discriminatory treatment. The longer the process, the less inclined the individual will be to complain.

E. *Record Keeping Requirements*

The argument will be heard that the keeping of records which reflect the race, color, religion, sex and national origin of a job applicant or employee will promote discrimination rather than eliminate it, and anguished cries will be heard from some businessmen that the ever in-

[53] For specific examples of the slow remedy which the law provides, see Hill, supra note 25, at 33-35.

[54] §§ 706(b), (e).

[55] § 706(b).

[56] § 706(e). The right of an individual complainant to bring suit was finally conceived as the basic enforcement device in Title VII. Although this right will remain important to some individuals, the § 707 suits are more effective in curing widespread discrimination in employment.

[57] § 707.

[58] For excellent discussion of judicial enforcement, see Ranney, Enforcement of Fair Employment Under the Civil Rights Act of 1964, 32 U. Chi. L. Rev. 430, 453-69 (1965).

creasing burden of record keeping has become intolerable and that no additional records should be required by the Commission.[59] The fact remains, however, that the record keeping requirements are the heart of Title VII. Without adequate records reflecting the race, color, religion, sex and national origin of the applicants and employees, the problem of proving discriminatory treatment is almost insurmountable.[60]

Title VII grants the Commission sufficient power to ordain the keeping of necessary records.[61] The Commission may require such records to be kept as it considers reasonable, necessary and appropriate for the enforcement of the Equal Employment Opportunity Title of the Act. This power is qualified in a way which may cause some difficulty in certain judicial districts in the deep South. Section 709 (c) provides that any employer, employment agency, labor organization or joint labor-management committee which believes that the application to it of any of the Commission's record keeping requirements would result in undue hardship may bring a civil action for appropriate relief in the United States district court in the district where such records are kept. Hopefully, the concept of "undue hardship" will be narrowly construed, but there is no guarantee that this will be the case. It would indeed be paradoxical if the courts took away with one clause what Congress granted with another.

The role of law in the equal employment field can be fulfilled only through adequate provisions for coverage and enforcement. While the coverage of Title VII is excellent, the enforcement provisions may prove inadequate.

IV. A Comment on Sex

A great deal has been said about how the prohibition against discrimination on the basis of sex crept into the definition of unlawful employment practice in Title VII.[62] Although it may be true that the "sex" amendment was adopted without opportunity for serious evaluation of its effect, there can be little sympathy with the position that some action of this type was not needed. The degree to which this prohibition will affect American employment practices will largely depend on Commission and judicial interpretation of the so-called "bona fide occupational qualification" exception in section 703(e).

It has been suggested that this "bona fide occupational qualification" test could be used to continue the exclusion of women from a

[59] See Where Civil Rights Went Wrong, Nation's Business, November 1965, p. 66.

[60] Any person who has ever attempted to show a pattern or practice of discrimination in a voting case will never forget the importance of racial designations in such records.

[61] § 709(c).

[62] See Cong. Q. Serv., Revolution in Civil Rights 49 (1965).

number of jobs.[63] The writer of a note in the Iowa Law Review expressed his own views and the hopes of many employers in this way: "However, one saving exception is available to the employer, agency, or labor organization that wishes to classify on the basis of sex."[64] The "saving exception" referred to allows the employer or labor organization to discriminate on the basis of religion, sex or national origin in certain instances where religion, sex or national origin is a "bona fide occupational qualification" reasonably necessary to the normal operation of that particular business or enterprise. The interpretation of what is "reasonably necessary" will be the task of the courts and the Commission, and the guidelines established will largely depend on the values of those who are interpreting this rather vague phraseology.

One would hope that the Commission and the courts will confine the "bona fide occupational qualification" exception to narrow limits. If the exception is used simply to confirm the culturally accepted standards of what work a woman or man should be doing, the prohibition against discrimination on the basis of sex will be rendered meaningless. A particular individual applying for a job should be judged on his or her own merits, not on the basis of fancied sexual characteristics attributed to the group to which he or she belongs.[65]

Many "sacred cows" should die during the next few years as the prohibition against sexual discrimination is applied. Laws which prohibit women from performing certain physical tasks will probably fall by the wayside. Likewise, legislation and contractual agreements which provide special wages, overtime pay or rest periods for women could be eliminated. The Commission has already announced that it considers restrictions on the employment or continued employment of married women an unlawful practice if such restrictions are not also applied to married men.[66]

The inclusion in Title VII of the prohibition against discrimination on the basis of sex was perhaps fortuitous, but this does not mean that one should immediately begin to explore clever devices to render it meaningless. Perhaps the Commission and the courts will utilize this opportunity to begin a new era of creative responsibility for Americans of both sexes.

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[63] Businessmen hope to be consulted when guidelines are established by the Commission for the interpretation of § 703(e).

[64] Note, Classification of the Basis of Sex and the 1964 Civil Rights Act, 50 Iowa L. Rev. 778, 792 (1965). The author made this point at 796: "Thus, where a woman applies for a job as a barber, the employer can establish his case merely by showing that hiring her would cause him to lose a significant number of patrons." He might be interested to know that the attractive blonde I saw through the window of the Houston Barber College a short while ago did not seem to provoke that reaction.

[65] Wilma Rudolph is certainly better qualified to run the 100-yard dash than most men, and I would assume that some men might make better nurses than some women.

[66] EEOC Opinion Letter, Sept. 9, 1965, BNA, L.R.X. 1879.

V. Conclusion

The role of law in the area of equal employment opportunity is a limited one. Yet, one can scarcely feel that the role of law has reached its full potential or effectiveness within the present framework of Title VII. The complaint and enforcement provisions of the title will probably need revision if the desired goal of equal employment opportunity is to be realized to the full extent possible under law. There will be vociferous opposition to the strengthening of the powers of the Commission,[67] and the present legal framework may prevail for several years before significant changes are made. Of course, it is possible that experience may prove the present scheme more feasible than is apparent. Some time will certainly have to pass before the feasibility of shared state and federal responsibility in this area is tested. Of one thing we may be certain, however. With the passage of time the law will increasingly play a major role in the creation and maintenance of equal employment opportunity. Its effective operation could be one of the most significant contributions to the alleviation of unreasonable discrimination in our lifetime. The failure of effective operation of law in this area could be damaging to our society in ways which one hesitates to contemplate.

[67] Supra note 59, at 60-73.